

Supreme Court, U.S.

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No. 87-1602

IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1987

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of Philadelphia County  
THOMAS FULCOMER, Superintendent  
Huntingdon State Correctional  
Institute; and  
LEROY ZIMMERMAN, Attorney General  
of Pennsylvania,

Petitioners,

v.

MICHAEL PEOPLES,

Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE CASE

Respondent raised the following claims in his federal habeas corpus petition (App. at 4a)<sup>1</sup>:

1. That he was improperly impeached with two prior robbery convictions and a theft conviction, in violation of his rights under the due process clause;
2. That the manner in which he was deprived of a non-jury trial violated his rights under the due process clause;
3. That suggestive pre-trial identification procedures were used; and,

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<sup>1</sup>Citations to the appendix are to the appendix in the court of appeals unless otherwise noted.

4. That he was denied the effective assistance of counsel based on:

a. trial counsel's failure to properly move to suppress the fruits of an illegal arrest; and,

b. trial counsel's failure to object to evidence of unrelated criminal acts.

The record in the courts of the Commonwealth of Pennsylvania is as follows: First, the due process claim based on the impeachment use of prior convictions was raised in the Superior Court of Pennsylvania (App. at 104a-106a) and in a pro se request for discretionary review<sup>2</sup> (labelled "Pro Se Petition for

Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel) filed in the Supreme Court of Pennsylvania (App. at 163a). This pro se petition was timely filed and by its own terms, constituted a request substantive review and for the appointment of counsel. Rather than address the merits of the pro se Petition for review, the Supreme Court of Pennsylvania appointed counsel to file a new petition for allowance of appeal (App. at 170a). Later, after the counselled petition was filed, the Supreme Court entered an order denying it without elaboration (App. at 31a). No formal order was entered ruling on the merits of the pro se petition.

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<sup>2</sup>The applicable rules of the Supreme Court of Pennsylvania provide for the filing of a petition for allowance of

appeal to invoke the court's discretionary jurisdiction. See Pa. Rule App. Pro 1111, et seq.

Second, the due process claim based upon the denial of a non-jury trial was raised in the trial court (App. at 166a), but was not raised in the Superior Court. It was raised in the pro se petition for review and the failure to raise the issue in the Superior Court was alleged to be caused by the ineffective assistance of prior appellate counsel. Specifically, the pro se petition alleged, as to the previous proceedings, that the petitioner therein was

denied his Federal and State constitutional rights to have effective assistance of counsel during the State's first direct appeal...because court appointed counsel...failed to raise and argue meritorious claims of error during trial, at post-verdict and post-sentence levels and stages of this case and failed to raise and argue ineffectiveness of former counsel who represented this petitioner in the following errors which occurred to prejudice petitioner:

(App. at 163a). Thereafter, various claims are listed, including the claim of a denial of due process rights due to the manner in which Mr. Peoples was denied a non-jury trial (App. at 165a-66a), and the claim of ineffective assistance of counsel based on trial counsel's failure to object to evidence of other crimes (App. at 168a).

Third, the claim based upon identification procedures was raised in the Superior Court and the pro se petition for review.

Fourth, the ineffectiveness of trial counsel due to counsel's failure to properly seek suppression of the fruits of an arrest was not raised in the Superior Court but was raised in terms of the ineffective assistance of trial counsel and of appellate counsel in the

counselled petition for review (App. at 41a-42a). In the counselled petition, it was specifically alleged that the failure of prior appellate counsel to raise the issue was due to the "ineffectiveness" of "appellate counsel" (*Id.*).

The ineffectiveness claim based on trial counsel's failure to object to the evidence of unrelated criminal acts was not raised in the Superior Court brief but was raised in terms of the ineffective assistance of trial counsel and of appellate counsel in the pro se petition for review. It was specifically claimed in the pro se petition that the failure to raise the claim in the Superior Court was due to appellate

counsel's ineffective assistance (App. at 168a).<sup>3</sup>

#### SUMMARY OF ARGUMENT

The petitioners incorrectly characterize the holding of the court of appeals in this case as establishing a rule that a state prisoner seeking federal habeas relief may establish the exhaustion of state remedies by demonstrating that the claims were previously presented to the state court of last resort, even if the claims were presented in a non-justiciable posture and in violation of state law. Here, petitioners allege that the failure to

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<sup>3</sup>It was alleged in the pro se petition that "appellate counsel [was] ineffective for failing to raise and argue use of prejudicial unrelated crimes evidence (App. at 168a).

raise certain claims in the Superior Court precluded review by the Supreme Court of Pennsylvania.

The petition should be denied because the petitioners have mischaracterized the holding of the court of appeals. All habeas claims were fairly presented to the state court of last resort for the following reasons.

First, as a matter of Pennsylvania procedure, respondent's claims were in a justiciable posture before the Pennsylvania Supreme Court, despite the fact that several were not raised in the Superior Court, because it was expressly alleged that the failure to raise the claims in the Superior Court was due to the ineffective assistance of prior appellate counsel. Under Pennsylvania law, the Supreme Court was to empowered

to address the merits and affirm, reverse on the record before it, or remand for further hearings.

Second, applying the cause and prejudice analysis articulated by this Court in Wainwright v. Sykes, 433 U.S. 72, 74 (1977), even if the petitioners could demonstrate that certain claims were arguably in a non-justiciable posture, there is no basis to find that the Pennsylvania Supreme Court declined to reach the merits of the claims on the basis of the alleged procedural defaults. Accordingly, the claims were exhausted even if there were a demonstrable means by which the state court could have avoided addressing the merits.

Third, although the third circuit's previous holding in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir.), cert.

denied, 108 S.Ct. 139 (1987), may arguably be construed to hold that defaulted claims are nonetheless exhausted, the record renders this case inappropriate for the review of such a holding since there was a clear means by which the Supreme Court of Pennsylvania could have reviewed the claims in this case.

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#### REASONS FOR DENYING THE WRIT

##### I. The Petition Should be Denied Because the Record Does not Give Rise to the Questions Presented in the Petition

The petitioners incorrectly characterize the unpublished opinion of the court of appeals in this case as establishing a rule, in conflict with the decisions of other circuits and of this Court, that a state prisoner may exhaust his remedies for purposes of federal

habeas relief by presenting his claims to the state court of last resort in a non-justiciable posture; that is, in violations of state procedural requirements. The petitioners allege that the respondent committed procedural defaults rendering the Supreme Court of Pennsylvania unable to review his claims and argue that, as a result, the claims were not "fairly presented" to the state court of last resort. This purported holding, along with a similar holding in a previous third circuit case, Chaussard v. Fulcomer, also does violence to principles of federal/state comity and accordingly, the petitioners argue, the petition should be granted.

It is respectfully submitted that the petition should be denied on the ground that the court of appeals did not hold in

this case that exhaustion may be established through the presentation of claims in non-justiciable posture due to violations of state law. Rather, in conformity with idiosyncratic provisions of Pennsylvania appellate procedure, the Supreme Court of Pennsylvania had a fair opportunity to review the claims later made in the federal habeas petition. Thus, in accordance with other circuits and the decisions of this Court, the claims were exhausted.

The alleged procedural defaults which are the basis for petitioners' argument are not immediately clear on the face of the petition.<sup>4</sup> However, of the four

habeas claims, the petitioners appear to contend the claim of a due process violation based on the manner in which the respondent was deprived of a non-jury trial was made in the state trial court but was not made in the Superior Court of Pennsylvania. In addition, it is contended that the two ineffectiveness of trial counsel claims (failure to properly move to suppress the fruits of an arrest and failure to object to the admission of evidence of unrelated crimes) were not presented in the Superior Court. The Supreme Court of Pennsylvania was thus not empowered to address the claims and, accordingly, petitioners argue, the claims were not fairly presented to the court.

Although respondent agrees that abandonment in the Superior Court could,

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<sup>4</sup>Petitioners do not appear to contend in this Court that the pro se petition in the Supreme Court may not be considered in determining exhaustion. The pro se petition was timely and complied with the applicable rules.

as a general rule, preclude Supreme Court review, here Pennsylvania's exception to the abandonment rule based on the ineffective assistance of counsel nonetheless provided the Supreme Court of Pennsylvania with an opportunity to review the merits of the claims, either on the record before it, or on a record to be made upon remand.

In general, in the federal appellate courts, as well as in the Pennsylvania appellate courts, an appellate court will not review a matter raised before it for the first time or abandoned in a lower court. See United States v. Schreiber, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979); Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974). However, Pennsylvania permits and indeed requires that the issue of the

ineffectiveness of counsel be raised at the earliest stage of the proceedings at which the allegedly ineffective lawyer no longer represents the defendant.

Commonwealth v. Webster, 490 Pa. 322, 416 A.2d 491 (1980).

In the courts of Pennsylvania, where the claim is made that earlier counsel has been ineffective and the Supreme Court or Superior Court can evaluate the merits of the claim on the basis of the existing record, the court can resolve the merits of the claim and affirm the conviction. See Commonwealth v. Johnson, 479 Pa. 60, 387 A.2d 834 (1978) (Supreme Court affirms conviction, reaching the merits of an ineffectiveness claim); Commonwealth v. Tessel, 347 Pa. Super. 37, 53, 500 A.2d 144, 152 (1985) (new counsel raises ineffectiveness claim for

the first time on appeal; affirming on the merits, the Superior Court states, "[t]he claim is ... properly before us.").

When the merits of the ineffectiveness claim, raised for the first time on appeal, are not apparent on the record, the Pennsylvania appellate courts may remand the case to the trial court for the purpose of a hearing on the merits. See Commonwealth v. Murphy, 316 Pa. Super. 178, 182, 462 A.2d 853, 855 (1983) (remand to Court of Common Pleas for hearing and a decision); Commonwealth v. Jellots, 277 Pa. Super. 358, 363, 419 A.2d 1184, 1187 (1980) (same). While there is no requirement that a collateral attack be mounted under the Pennsylvania

Post Conviction Hearing Act ("PCHA")<sup>5</sup>, the appellate court may, in its discretion, decline to address the issue, without prejudice to accused's right to raise the claim in a collateral attack under the PCHA statute. There is no known authority establishing when the Supreme Court of Pennsylvania is required to maintain jurisdiction and remand for hearings, or to decline to assert jurisdiction in lieu of a PCHA proceeding.

The case of Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977), appeal after remand, 485 Pa. 353, 402 A.2d 999 (1979), is instructive and demonstrates the manner in which the Supreme Court of

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<sup>5</sup>The Post Conviction Hearing Act (42 Pa. C.S. §9541, et seq.) establishes a means by which errors may be remedied on collateral attack.

Pennsylvania may review claims such as those asserted by respondent. In Hubbard, the defendant was convicted of murder in the trial court and on direct appeal contended that post-trial counsel<sup>6</sup> was ineffective because his post-verdict motions failed to raise a claim of ineffective assistance of trial counsel based on the latter's failure to object to certain prejudicial statements made in the prosecutor's closing. After finding the contention to be of "arguable merit," the Supreme Court vacated the judgment of sentence and remanded the case for an evidentiary hearing. 485 Pa. at 356, 402 A.2d at 1000. Upon

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<sup>6</sup>Hubbard was represented at trial by retained counsel (trial counsel), a public defender who filed supplemental post verdict motions (post-trial counsel), and on direct appeal by another public defender (appellate counsel).

completion of the hearing and the entry of an adjudication by the trial court, the matter was placed directly before the Supreme Court which affirmed the conviction, 485 Pa. at 358, 402 A.2d at 1000-01.

Finally, when the merits of a claim of ineffective assistance of counsel are susceptible to review on direct appeal, the Supreme Court may resolve the merits and reverse the judgment of sentence. Commonwealth v. Morin, 477 Pa. 80, 383 A.2d 832 (1978). In Morin, the defendant's first counsel failed to raise the issue of the defendant's waiver of a jury trial in post-verdict motions and before the Superior Court. In the Supreme Court of Pennsylvania new counsel raised the issue in terms of ineffective assistance of counsel. Rejecting the

prosecution's argument that the case should be remanded for a hearing on the matter, the Supreme Court resolved the merits of the claim, reversing the judgment of sentence and remanding the case for a new trial. 477 Pa. at 88, 383 A.2d at 835.

Here, respondent specifically alleged in his pro se request for discretionary review before the Supreme Court of Pennsylvania that all of his claims, including the due process claim based on the denial of a non-jury trial and the ineffectiveness of trial counsel claim based on the failure to object to evidence of unrelated crimes, were omitted from the Superior Court submission of prior counsel due to counsel's ineffectiveness. Similarly, the ineffectiveness claim based on trial

counsel's failure to properly move to suppress the fruits of an arrest was specifically raised in the counselled petition for review and the failure to raise it in the Superior Court was alleged to constitute the ineffective assistance of appellate counsel. Under the exception to the abandonment rule described in Hubbard and Morin, supra, the Supreme Court of Pennsylvania was empowered to adjudicate the merits of the claims. Accordingly, the Supreme Court had a fair opportunity to review the merits of the claims on direct appeal.

II. Under the Cause and Prejudice Analysis Articulated by This Court  
In Wainwright v. Sykes  
The Habeas Claims were Exhausted

Under this Court's decision in Wainwright v. Sykes, 433 U.S 72 (1977), when the claim is made that a habeas

claim is not exhausted because, as a matter of state law, the claim was abandoned either at trial or on appeal and thus was unreviewable by the state court of last resort, the habeas court must make two determinations. See Klein v. Harris, 667 F.2d 274, 285 (2d Cir. 1981). First, the habeas court must determine whether the state court relied upon the procedural default in declining to grant relief. Second, if the state court did so rely, the habeas court must consider whether there was adequate cause for the default and sufficient resulting prejudice to the accused to satisfy the Sykes standard. Id. Before this analysis is undertaken, it is necessary to determine whether the state court actually invoked the procedural default as a bar to the granting of relief. Id.

Here, there is no basis to believe or contention that the Supreme Court of Pennsylvania invoked any alleged procedural default as a bar to review since that court simply denied review without comment or elaboration (App. at 31a). Accordingly, the alleged procedural default may not be presumed to have defeated review and may not be used to defeat exhaustion in the habeas court.

### III. This Is Not the Appropriate Case to Review the Third Circuit's Holding in Chaussard v. Fulcomer

The petitioners point to the third circuit's reliance in this case on a previous decision of Chaussard v. Fulcomer, supra,<sup>7</sup> and contend that

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<sup>7</sup>In Chaussard, the district court dismissed on exhaustion grounds and the third circuit reversed, finding that the claims were exhausted. The third circuit then considered the merits of the claims,

Chaussard makes clear that the third circuit will find exhaustion in a clear case of an abandonment of a claim in the Superior Court of Pennsylvania, even to an abandonment as to which the ineffectiveness of counsel exception is not applicable.

In Chaussard, the respondents to the habeas petition contended that two of the four federal habeas claims had been abandoned in the Superior Court, precluding review in the Supreme Court of Pennsylvania, even though the abandoned claims were pressed in a request for discretionary review in the latter court. Id. at 927-28. Without any discussion of whether abandonment precluded review in

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and on that basis, affirmed the order of dismissal. The habeas petitioner then unsuccessfully sought review of the third circuit's holding on the merits of the claims.

the state court, the third circuit held that the claims were exhausted because they were raised in one of two petitions for discretionary review in the Supreme Court of Pennsylvania.<sup>8</sup>

Even assuming that two of the four habeas claims were not raised in the Superior Court, this case does not present the issue. Although these facts are not discussed in the opinion in Chaussard, counsel for the respondent reviewed the record in Chaussard and informed the third circuit panel at oral argument in this case that the two claims appeared to have been abandoned in Chaussard. However, to the extent Chaussard may be read to establish a rule

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<sup>8</sup>Chaussard is similar to this case in that pro se petitions for review, followed by counselled petitions for review, were filed in both cases.

that claims presented to the state court of last resort in a non-justiciable posture, the respondent in this case has not and does not rely on it. Rather, respondent has consistently contended that the claims which were arguably abandoned because they were not raised in the Superior Court were nonetheless reviewable because the failure to raise the claims was alleged to be due to the ineffective assistance of appellate counsel.

The petitioners ask this Court to strike down what they view as a pernicious holding in Chaussard through this case. Such a request is inappropriate under this Court's principle of carefully choosing the cases to be given plenary review. Chaussard would likely present a very interesting

opportunity to engage in an analysis of whether and when procedural defaults will defeat exhaustion, all in the context of an interesting factual and procedural record. Despite the citations to Chaussard by the panel in this case, and the fact that this case and Chaussard both involve pro se petitions for discretionary review, this record does not give rise to the question of whether disqualifying procedural defaults in the state record will defeat exhaustion. The answer to that question must await the presentation of the appropriate record to this Court.

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#### CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition

for a writ of certiorari should be  
denied.

Respectfully submitted,



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